Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
	)	
Petition of U S West Communications, Inc. for Forebearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

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SUMMARY

Following adoption of the Telecommunications Act of 1996, many Rural Telephone Companies have established competitive local exchange carrier operations to bring improved service to the small rural towns and surrounding areas adjacent to their existing service territories. Generally, these areas have received only minimal investment or attention from the large carriers serving them. These rural CLECs have offered facilities-based competition wherever possible and, by necessity, have established their local rates at levels customers will find competitive. In recognition of common regulatory and legal issues facing them, many of these rural CLECs have now formed an alliance under the name Rural Independent Competitive Alliance (RICA).

In order to remain in business, rural CLECs must also have a sufficient amount of access revenue to allow for rational cost recovery. Because their costs are incurred only in the rural, low density areas, their access rates do not benefit from the study area wide or larger averaging of the large carriers with which they compete. Even without averaging, because the rural CLECs have made substantial investments in modern facilities, their costs are often higher than those associated with the obsolete, largely depreciated facilities of the large carrier.

Typically, the rural CLECs have set their access rates at the level of their parent company, which is reasonably representative of the CLEC's operations. In the guise of objecting to the level of these rates, AT&T has decided unilaterally not to offer its long distance service to subscribers of the rural CLECs, unless the CLECs price their access at the same rate as the BOC in the state. Because it is financially infeasible to operate a CLEC at the revenue levels which

would result, AT&T's demand constitutes a constructive refusal to provide interstate service to the rural CLECs' subscribers. If the IXC industry is allowed to pick and choose which customers it will serve, local competition in rural areas will evaporate.

The Notice of Proposed Rulemaking requests comment on two principal issues. First, are IXCs free to refuse to accept or deliver traffic to or from a LEC? Second, should there be some form of regulation of CLEC interstate access rates? RICA's response to the first issue is no, and to the second yes, if necessary, but in the least burdensome manner.

As common carriers, IXCs are not free to pick and choose their customers, but are required to hold out their services to all indiscriminately. This requirement is reinforced by the interconnection obligations of Section 201(a) and 251(a) of the Communications Act. Because AT&T, the leading *refusnik*, has such a large market share in rural areas, and has announced its intentions to provide local service, there is substantial anti-competitive potential in its power to selectively refuse customers of certain carriers.

A refusal to serve rural CLEC customers also violates Section 201(b), 202(a) and 203(c) of the Act. AT&T's assertion of a right to pay no more for access than the rates of the large incumbent ILECs is unreasonable given the rural CLEC's higher cost and inability to utilize statewide averaging. The refusal to serve is an unjust and unreasonable discrimination in that it harms subscribers who choose to subscribe to the services of the rural CLEC, and provides a competitive advantage to the large LEC incumbent. In the absence of lawful tariff provisions establishing which customers are or are not offered service, the refusal to serve also violates Section 203(c).

For any IXC, such as AT&T, which has been providing service to a community, refusing or limiting the service it will provide to the part of the community which subscribes to the services of a rural CLEC is a violation of Section 214(a) of the Act, unless the Commission has issued a certificate of public convenience and necessity. Refusal to serve customers of rural CLECs also violates the principle of Section 254(b)(3) that consumers in all regions should have access to telecommunications services comparable to those in urban areas. Refusal also directly and indirectly offends Section 254(g) because the result is that at least some subscribers in rural areas may not obtain service at rates no higher than urban areas.

The fact that IXCs are required to charge the same rates in urban and rural areas, even though rural access is known to be more expensive, was a conscious decision by Congress to ameliorate the effects of the marketplace and to preserve the externality benefits of ubiquitous service. If IXCs are free to refuse to serve customers of rural CLECs because the IXC judges the access rates to be too high, there can be no doubt that the next move will be to refuse service to customers of rural ILECs unless their access rates are reduced to non-compensatory levels.

The requirement to serve all indifferently, and to charge rural subscribers the same as urban, does not mean that IXCs are required to operate at a loss, or that they have no recourse if CLEC rates are, in fact, too high. Although there is no basis for an assumption that any of the rural CLEC rates are unjust or unreasonable, the Act provides IXCs with an adequate mechanism to test those rates. AT&T has chosen self-help instead of the prescribed method, but that does not make Section 208 an inadequate remedy. AT&T is entitled to just and reasonable access rates, but it is not entitled to free service .

The Commission's various proposals to shift the access cost to end users of rural CLECs offend the Act for the same reasons as AT&T's actions, because they all amount to charging rural customers more than urban customers. Similarly, mandatory detariffing, even if otherwise legal, would be harmful to competition in rural areas. The optimal solution would be for the Commission to establish a benchmark for rural CLECs, at or below which the access rate would be presumed reasonable. Rates above that level would be subject to case by case determinations. An initial benchmark should be set at the either the individual rate of the ILEC parent, or the NECA rate increased or decreased by net settlement. After three to five years, the benchmark would move to the NECA rate.

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COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance (RICA) files these comments in response to the Fifth Report and Order and Notice of Proposed Rulemaking in CC Docket No. 96-262, FCC 99-206, released August 27, 1999.

I. INTRODUCTION AND BACKGROUND

RICA is a newly formed alliance of Competitive Local Exchange Carriers ("CLECs") operating in rural areas and generally affiliated with incumbent Rural Telephone Companies. RICA members are bringing competitive alternatives to residential and small business customers in rural communities which would otherwise often be without the benefits of

modern, reliable communications services. RICA members thus operate in a very different environment from that of the large CLECs which have, to date, concentrated on urban areas and high volume, low cost customers.[1]

RICA members are a further step in the evolution of service to the more remote, lower density, higher cost regions of the country. By the end of the Second World War, telephone service in rural areas had substantially declined, leaving many areas with no service at all. Although service was often, but not always, available in towns, farmers and ranchers in the surrounding rural areas had no access to the telephone network..[2] With the advent of the Rural Electrification Administration loan programs, a majority of what are today classified as Rural Telephone Companies were organized to fill this void With the assistance of REA (now Rural Utilities Service--RUS) and subsequent improvements in toll settlements as a result of revisions to the jurisdictional separations manual, these companies have successfully expanded and improved service in areas that were of no interest to the large carriers.[3]

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[1] Some RICA members are also expanding their competitive business to nearby metropolitan areas.

[2] *Hearings on S.78, S.121, S.1254, H.R. 2960 Before the Committee on Agriculture and Forestry,* 81st Cong, 1st Sess. (1949) (Statement of Claude R. Wickard, Administrator, Rural Electrification Administration) ("Today the number of farms having telephones is actually smaller than it was 30 years ago. The 1920 census showed 2, 473,000 farms with telephones. In 1945 the number had decreased to 1,866,000. Today, by liberal estimates, the total is 2, 473,000 or about 25,000 fewer than in 1920.") *See* Lavey "The Public Policies that Changed the Telephone Industry Into Regulated Monopolies: Lessons From Around 1915," 39 Fed. Communications L.J. 171, 182 (1987) (Lavey).

[3] *See,* Rural Utilities Service, 1996 Statistical Report, Publication No. 300-4, Chart 3 (1997).

While the Rural Telephone Companies were meeting the challenge of low density and high cost, telephone service in the small towns and trading centers remained mostly under the control of the large companies, such as the Bell Operating Companies and GTE. As these companies began to perceive that their urban markets would face competitive challenges, their rural service areas did not receive the investment and attention needed to maintain parity with the evolving industry. As a result, many of these communities looked to the neighboring Rural Telephone Companies as a potential source for improved communications.

Until the passage of the Telecommunications Act of 1996, however, there was little that these companies could do to respond to these requests because of the system of territorial boundaries established in most states. With the elimination of these restrictions, and the adoption of provisions for interconnection at the local level, many Rural Telephone Companies have created CLEC operations or subsidiaries to respond to the pleas of their neighbors to bring high quality service into these technologically underserved areas.

In their analysis of the feasibility of providing such service, the RICA members recognized that, for the most part, only facilities-based competition would provide any benefits to these rural communities.[4] Resale or use of unbundled elements from the incumbent would not result in improved service where the subscriber dissatisfaction was caused in large part by the incumbent's obsolete, ill-maintained outside plant and switching facilities. RICA members also recognized that their service offerings would have to be price competitive with the

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[4] Although the focus is on facilities based competition, some rural CLECs may use resale or unbundled network elements in order to more quickly provide service until facilities can be constructed.

incumbent, with some leeway to recognize the provision of substantially improved service. With this constraint on local revenues, compensatory access revenues are a necessary component of a rational rate design which allows the recovery of the cost of service without which a competitive offering would not be feasible. Petitioners have consciously adopted rate designs similar to those predominant in the industry as a commercial necessity.

In estimating probable access revenues, RICA members recognized that interexchange carriers would certainly object if rates were set beyond what the affiliated Rural Telephone Company charged and accordingly generally adopted the same or lower access rates, for both state and interstate access. This method reasonably recognizes that the operation of the affiliated LEC is likely to be representative of its CLEC subsidiary.

Despite what they believe to be a reasonable method of setting access rates, Rural CLECs have nevertheless been faced with the demand of AT&T that they set their access rates at no higher than the level of the incumbent BOC (or in some instances GTE). Because the BOC rates were established on the basis of an average cost of at least a study area, including large, low cost, urban centers, the underlying operations are not representative of the rural CLEC operation and the rates do not produce sufficient revenue to recover the access costs of carriers operating solely in rural areas. When the RICA members refused to lower their access rates to financially ruinous levels, AT&T responded with a variety of positions which, in essence, asserted the right to discontinue providing interstate service to the customers of the RICA

members.[5]

AT&T's claims of a right to discontinue service were made either in the context of a purported cancellation of service, such as in the MGC case, or as part of the charade it attempted to perpetrate in its declaratory ruling petition with the claim that it had never ordered service.[6] These claims generally ignored the clear holdings of the Commission and the courts that service may be constructively ordered.[7] In many instances, AT&T asserted that it did not want CLEC subscribers as customers while simultaneously marketing service to these customers and submitting preferred carrier changes to the CLEC.

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[5] In words quite similar to those found ambiguous in *MGC*, ATT told one RICA member "AT&T did not place an Access Service Request (ASR) with XIT for switched access services; therefore, we have not agreed to purchase XIT's access services at the rates indicated on your bill. We will not process payment of access charges for services that AT&T has not requested. However, since AT&T does not want to negatively impact our mutual customers' calling capabilities, we will pay terminating access charges to XIT for calls we direct to your local customers. Letter from W. J. Taggert III, AT&T, to Barbara Spielman, XIT, Apr. 15, 1999. Subsequently the CLEC disconnected AT&T for non-payment.

[6] *See, e.g.*, Letter from William J. Taggart III, AT&T to Kenneth Kebschull, Heart of Iowa Communications, Inc., Mar. 30, 1999, a copy of which is enclosed as Attachment A. ("AT&T did not place an Access Service Request (ASR) with Heart of Iowa Communications; therefore, we have not agreed to purchase your access services under any terms, including the rates indicated on your bills....To avoid any inconvenience to Heart of Iowa's Customers, and at least for the present, AT&T will continue to complete calls to and from Heart of Iowa's local service customers.")

[7] *United Artists Payphone Corporation v. New York Telephone Company and American Telephone and Telegraph Company*, 8 FCC Rcd 5563 (1993); *In the Matter of Capital Network System, Inc. Tariff FCC No. 2, Memorandum Opinion and Order*, 6 FCC Rcd 5609 (1991), *application for review denied, Memorandum Opinion and Order*, 7 FCC Rcd 8092 (1992); aff'd *sub nom. Capital Network System v. Federal Communications Commission*, 28 F.3d (D.C. Cir. 1994).

AT&T also engaged in the "self-help" of refusing to pay for the access it actually received, and, in various forms, asserted that it did not want to subscribe to access service from the RICA members.[8] As a result, RICA members have large outstanding bills unpaid by AT&T, and are exploring their collection remedies.[9] On a prospective basis, however, disconnection of service to AT&T has substantial practical problems, as well as the legal and public interest issues involved with AT&T's claim that it need not fulfill its common carrier obligations to provide service to all who request it.

The practical problems arise because AT&T has established interconnection arrangements at the ILEC tandem switching offices which RICA members subtend. Thus although a member CLEC can remove the coding for AT&T presubscription from the CLEC's switch, it has no practical means to block access to AT&T by subscribers dialing 1010288 or 1 800 CALL ATT. Since AT&T also claims that it cannot block this traffic,[10] it asserts that, in

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[8] *See* n. 7, *supra*. The issue in these disputes is payment for originating access, AT&T has generally payed terminating access, although sometimes it dose not identify which portion of an access bill a partial payment is intended to cover.

[9] In *MGC*, the Common Carrier Bureau, following an accelerated complaint proceeding, ordered AT&T to pay unpaid charges where AT&T's claims that it had terminated services were found to be ambiguous. *MGC Communications, Inc. v. AT&T Corp., Memorandum Opinion and Order,* CCB File No. EAD-99-002, DA 99-1395, released Jul. 16, 1999 (MGC). The Bureau has indicated that it does not plan to accept any more such cases on its accelerated docket.

[10] In MGC, the Bureau "credited" AT&T's testimony that it was not practical for it to block traffic. *MGC* at para. 16, n.32. The ability to block traffic was not a central concern to MCG. In any event, since RICA members had no opportunity to participate in developing the factual record, they cannot be bound by its conclusions.

effect, the CLEC must provide access for free.[11] In the meantime, the refusal of AT&T to pay reasonable rates, its apparent ability to obtain free dial-around access, and its refusal to provide 1+ service to customers of CLECs all work to the great advantage of the incumbent LECs. If the AT&T position prevails, the probability of a competitive spur to improvement of service in rural areas will be substantially diminished.

With this background, RICA's comments address below the issues raised in the NPRM.

II. IXCS CANNOT UNILATERALLY REFUSE TO SERVE CLEC SUBSCRIBERS

A. AS COMMON CARRIERS, IXCs CANNOT PICK AND CHOOSE THEIR CUSTOMERS.

This proceeding arose out of AT&T's claims that it could refuse to provide 1+ calling service to customers of CLECs if, in its sole opinion, the CLEC's access charges were more than it wanted to pay. [12] The Commission's NPRM notes correctly that the Common Carrier Bureau's decision in MGC did not conclude that AT&T was legally permitted to unilaterally refuse to serve customers of CLECs, only that the provisions cited by MGC did not preclude such action. [13] As "telecommunications carriers," IXCs are not free to offer service to some members of the public and not to others.

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[11] Letter from Peter Jacoby, AT&T to David Cosson, counsel to Heart of Iowa Communications, Aug. 16, 1999: "If HOI nevertheless continues to route any traffic to AT&T's network, despite AT&T's repeated express requests that HOI cease such actions, AT&T is not obligated to and will not pay any originating access charges...."

[12] Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, CCB/CPD File No. 98-63.

[13] AT&T incorrectly characterizes the MGC decision as concluding that AT&T "was legally entitled to cancel its order of originating switched access. Letter from Peter. Jacoby, AT&T to Ray Vawter, Iowa State Utilities Board, September 1, 1999.

> The primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently.[14]
>
> [T]o be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve.[15]

The common law principles cited above directly address the issue raised in the NPRM, "whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service."[16] Of course, AT&T has twisted the issue to be one of whether it is compelled to take access service, but the necessary implication of this stance is whether it can refuse to provide 1+ dialing to CLEC customers. Refusal to serve is the unavoidable corollary of refusal to take access from the CLEC where service to any potential user depends upon an IXC's access to customers which is provided by the LEC

The common law obligations of a common carrier are reinforced by the statutory requirements to interconnect. The factual predicate for requirements to interconnect can be seen in the early practices of AT&T refusing to interconnect its "long lines" with independent telephone companies in order to force them to sell out, or stop competing with AT&T affiliated local exchange carriers.[17] Section 201(a) authorizes the Commission to order "physical interconnection between carriers, to establish through routes and charges applicable thereto and

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[14] *Southwestern Bell Telephone Co. v. FCC,* 19 F.3d 1475, 1480 (D.C. Cir. 1994).

[15] *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641, (D.C. Cir. 1984), *cert. denied,* 469 U.S. 1227 (1985).

[16] NPRM at para. 242.

[17] *See,*n 20, *infra.*

the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes."[18] Section 251(a) makes it the duty of every telecommunications carrier "to interconnect directly or indirectly with the facilities and equipment of other carriers...."[19]

To date, AT&T has been the principal advocate of the right to refuse to interconnect, i.e., to provide service to subscribers of rural CLECs. Although there are a large number of IXCs, only a very few have nationwide facilities based networks, and the next two largest IXCs have agreed to merge. Even if only AT&T refuses to serve rural CLEC customers, for historical reasons its market share in rural areas is much larger than its national average share. It is therefore much more difficult for a rural CLEC to attract business if it does not offer AT&T as being among the choices of preferred carriers for 1+ dialing.

AT&T has announced its intention to enter the local service market itself. If it can establish a principle that its long distance business can pick and choose which local carriers will be able to provide connection to its long distance business, it will then be in a position to establish tying arrangements between its CLEC and long distance businesses, much as it did at

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[18] 47 U.S.C. 201(a). In an early case, the Commission sanctioned a Bell System company's refusal of interconnection, over the strong dissent of one Commissioner. *Oklahoma-Arkansas Telephone Company v. Southwestern Bell Telephone Company, Report and Order of the Commission,* 6 FCC 809, 836 (1939)(Walker, Comm'r. dissenting) ("That arbitrary extinction of the competition of small companies by the largest telephone company in the country would be contrary to the public interest, probably would not be questioned; but eventual extinction of competing companies by the Bell System and the gradual absorption of their business desired by the Bell companies generally involve only the resorting, in sufficiently numerous other situations to the method used by respondent herein.")

[19] 47 U.S.C. 251(a)(1).

the beginning of the century.[20]

B. IXC REFUSAL TO SERVE RURAL CLEC CUSTOMERS IS AN UNJUST AND UNREASONABLE PRACTICE AND AN UNJUST AND UNREASONABLE DISCRIMINATION IN VIOLATION OF SECTIONS 201(b), 202(a) AND 203(c).

The IXC reply to the common carrier obligation argument will likely be that the law allows it to set reasonable regulations for the use of its service. That much is true, but the Communications Act qualifies the carrier's discretion by requiring that all such regulations be just, reasonable, not unjustly or unreasonably discriminatory, and set forth in its tariffs.[21] The refusal to serve selected CLEC customers fails each of these requirements.

It is unreasonable to refuse to serve a customer because the customer has chosen to subscribe to a CLEC with higher access charges than the incumbent. The RICA member CLECs have costs that are higher than the price charged by the incumbent for a variety of legitimate reasons. First, as exclusively rural operations, they do not have the incumbent's ability to average their rural costs of a small number of access lines with the lower urban costs of a large number of lines.[22] Second, because they must offer greater value than the incumbent in order to

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[20] Apparently old habits die hard. When first faced with competition on the expiration of its patents, AT&T denied the new exchange carriers interconnection with its long distance network, and the Department of Justice forced it into the "Kinsgsbury Commitment." Letter from Nathan C. Kinsgbury, AT&T, to James C. McReynolds, Attorney General, Dec. 19, 1913; *United States v. AT&T*, No. 6082 (D. Or. 1914); Although ending the use of interconnection as a weapon, the Kingsbury Commitment had sufficient loopholes on restrictions on acquisitions, that AT&T was able to rapidly extend its control over the industry. Lavey at 179, n.22.

[21] 47 U.S.C. 201(b), 202(a), 203(c).

[22] Nor, as CLECs, do they even have the ability to participate in the NECA pools to obtain the averaging benefits those pools provide.

attract customers, the RICA member CLECs have made substantial investments in new facilities which have costs exceeding that of older, substantially depreciated plant.

These two factors are interrelated in that only small and rural companies are willing to make substantial investments to improve communications in rural areas, a result which in the public interest and an objective of the 1996 Act.[23] A finding that it is reasonable and lawful for an IXC to refuse to serve customers of a CLEC with access charges that recover a reasonable share of prudently incurred costs will necessarily mean that no such investments in rural areas will be made.

C. REFUSAL TO SERVE RURAL CLEC CUSTOMERS CONSTITUTES DISCONTINUATION AND/OR IMPAIRMENT OF SERVICE IN VIOLATION OF SECTION 214(a).

Section 214(a) provides, in part: "No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby...."[24] AT&T's decision not to continue to provide 1+ service to subscribers who change their local service from an ILEC to a CLEC is a discontinuance, reduction or impairment of service in those communities or parts of those communities. The Commission has previously found that elimination of service to a particular category of users constitutes denial of service to a part of a community.

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[23] 47 U.S.C. 151, 254(b).

[24] 47 U.S.C. 214(a).

In *Chastain v. AT&T*, the Commission was presented with AT&T's refusal to continue service to users of portable manual mobile telephones. The Commission held that: "The service offering that had theretofore been rendered to users of portable manual units represented a service offering to a part of the communications community. Before it was effectively canceled, AT&T was obliged to seek certification, but failed to do so."[25] On reconsideration, the Commission affirmed it decision, stating: "The policy in question amounted to a discontinuance of service to a definable group of customers, and as such, we find that the procedures of Section 214(a) should have been complied with...."[26]

Just as Chastain's Attache Phone users who were denied service by AT&T were a definable group of customers, so are those who subscribe to the local services of rural CLECs. This part of the communications community is entitled to the protection of Section 214(a), which AT&T has again violated. Appropriate enforcement proceedings should therefore be instituted to restore service which has been unlawfully discontinued and to send a clear signal to other IXCs which might have similar inclinations.

D. REFUSAL TO SERVE RURAL CLEC CUSTOMERS VIOLATES SECTION 254(b)(3).

Section 254(b) sets out a list of principles upon which the Commission is to base policies for the preservation and advancement of universal service. The third principle is that:

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[25] *Referral of "Chastain et al. v. A.T. & T" From the United States District Court for the District of Columbia,* 43 FCC 2d 1079, 1085 (1973); *recon. denied*, 49 FCC 2d 749 (1974).

[26] 49 FCC 2d at 752.

> Consumers in all regions of the Nation, including low-income consumers and those in rural, insular and high cost areas, should have access to telecommunications and information services, *including interexchange services* and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and at rates that are reasonably comparable to rates charged for similar services in urban areas (emphasis added).[27]

This principle requires that the Commission's policies refuse to tolerate any IXC's refusal to serve customers of rural CLECs. By its policy that it will not serve the customers of rural CLECs unless their access charges are set to recover no more than urban LEC costs, AT&T is, in effect, giving rural customers the choice of either inferior, local service not subject to competition, or no access to AT&T long distance service. If AT&T can withdraw from serving customers of rural CLECs, so can the other IXCs, leaving rural customers without the comparable services envisioned by Section 253(b).

RICA recognizes that the Court of Appeals has described Section 254(b) as a set of principles to be considered in developing policies, rather than specific statutory commands.[28] In the context of this rulemaking, however, the Commission, acting within its authority over interstate communications, is compelled to ensure that its policies and rules are consistent with these principles. The Commission must therefore adopt rules which foreclose the type of behavior exhibited by AT&T.

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[27] *Id.*, 47 U.S.C. 254(b)(3).

[28] *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999).

E. REFUSAL TO SERVE CUSTOMERS OF RURAL CLECS IS A TRANSPARENT ATTEMPT TO AVOID SECTION 254(g).

Section 254(g) requires, and the Commission has adopted rules to require, that rates charged by IXCs to rural subscribers are no higher than rates charged to their subscribers in urban areas, and that rates in one state are not higher than rates in another state.[29] The purpose of this provision is to require maintenance of the long standing national policy favoring uniform toll rates in order to ensure the integration of rural and high cost areas into the telecommunications network.[30]

Throughout the long history of this policy, it has always been understood that long distance carriers face higher costs in rural areas than in urban areas, but that a nationwide rate which recovers the average of the urban and rural costs is in the public interest. Such a rate structure recognizes the economic externalities which flow to the benefit of all users when usage is encouraged, rather than discouraged. The policy also recognizes the social importance of integration of all areas of the country into the national fabric.

Faced with this compulsion to serve high and low cost areas with uniform rates, interexchange carriers have an incentive to avoid offering service to high cost areas. AT&T, however, which historically offered service to at least all areas of the contiguous states, is now trying to avoid the requirement of Section 254(g) by declaring its refusal to serve customers of CLECs whose rates are not based on urban costs. It is precisely because of the ability of IXCs to escape their obligations under Section 254(g) that the Commission must enforce the Section

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[29] 47 U.S.C. 254(g); 47 C.F.R. 64.1801.

[30] NPRM at para. 245 and n. 597.

214(a) requirement that discontinuance or impairment of service requires prior permission. If AT&T can refuse to serve rural CLECs which have higher than urban costs, it can just as easily discontinue service to rural ILECs.

F. IXCS HAVE AN ADEQUATE REMEDY FOR EXCESSIVE ACCESS CHARGES BY CLECS UNDER SECTIONS 208 AND 214

RICA members recognize that they are subject to the requirements of Sections 201(b) and 202(a) that their interstate rates be just, reasonable and non-discriminatory. These requirements subject CLEC rates to the potential of being tested in a complaint brought under Section 208. The RICA members are willing to defend their rates in any such proceeding, despite the enormous disparity in litigation resources available to large IXCs such as AT&T. Nevertheless, AT&T has not challenged the legality of the rates, but has only said it doesn't want to pay them. The logical implication is that AT&T recognizes that the rural CLEC rates are cost based and are not unreasonable, and that such a finding by the Commission would make it more difficult to refuse to serve the customers of the rural CLECs.

G. THERE IS NO BASIS FOR AN ASSUMPTION THAT ACCESS CHARGES ARE UNREASONABLE

The NPRM appears inappropriately to accept the claims of ATT that CLEC access rates are too high, despite the lack of any factual analysis beyond comparison with rates of other, non-representative, carriers. In its Declaratory Ruling petition, AT&T attempted to paint a picture of CLECs establishing extreme levels of access charges without justification.[31] The comments in

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[31] *See* Public Notice, *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers,* CCB/CPD 98-63, DA 98-2250, Nov. 5, 1998.

that proceeding demonstrated that many of the rates cited by AT&T were simply wrong.[32] While RICA cannot comment on the rate levels of individual CLECs, especially non-members, it can state that its members' practice generally is to set rates at levels designed only to recover their costs. Many rural LECs have adopted the NECA rate levels, or some average of small ILEC rates within their state. AT&T has focused on the fact that these rates are usually higher than those of the Bell Operating Company in the state (even where the CLEC is competing with GTE which has higher rates than the BOC), and has ignored the issue of whether the rates are, in fact, cost justified.

H. IXCS HAVE NO RIGHT TO FREE ACCESS SERVICE

AT&T is further motivated to claim it does not want access service by the fact that the rural CLECs cannot block some of the traffic. Since AT&T claims that it is impractical for it to block the traffic, the result is, in effect, a claim of a right to free service.[33] This use of CLEC access service without payment is nothing short of unjust enrichment of one of the largest carriers in the world. A determination that rural CLEC rates are reasonable would tend to deprive AT&T of this windfall.

AT&T's claim that it can refuse to subscribe to access service on the basis of its unilateral determination that the rates are too high must be viewed in the context of its continued practice of constructively ordering service and receiving the benefits thereof. AT&T not only

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[32] *See, e.g.* Comments of Association for Local Telecommunications Services at 7-8; Teligent, Inc. at 9; Winstar Communications, Inc., Declaration of Russell C. Merbeth.

[33] RICA does accept AT&T's claims that it cannot practically block all forms of originating access.

engages in nationwide marketing of its services, without any disclaimer as to availability, but it also markets directly to rural CLEC customers and submits preferred carrier changes to the rural CLECs. When the customer makes a call over AT&T's network, which AT&T claims it did not want, it has no qualms about pocketing the revenue, even while refusing to pay the CLEC for the costs incurred. If AT&T subscriber asserted it did not want long distance service, but managed to get long distance service free because AT&T could not block the traffic, ATT would charge the subscriber with theft of service.

III. THE COMMISSION'S PROPOSED SOLUTIONS ARE NOT PERMITTED BY THE ACT

The NPRM states a preference for a market-based, rather than regulatory solution for the issues discussed above. In the course of stating this preference, the NPRM tends to indicate that the Commission has prejudged the issue of whether there is a legitimate "need to constrain CLEC access charges" based solely on the allegations of AT&T. [34] Nevertheless, RICA would also prefer a non-regulatory solution to the debate, but only if such solution allows rural CLECs a fair opportunity to recover their costs of providing service in a manner consistent with the Act. Several of the Commission's proposals fail this test and would, therefore, fail to achieve a result in the public interest.

A. IXCS MAY NOT CHARGE DIFFERENT RATES TO SOME CUSTOMERS.

One category of proposed solutions is to allow the IXCs to charge different rates to different customers located in the same town, depending upon the access rates charged by the

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[34] NPRM at para. 254.

customer's chosen local exchange carrier.[35] This may well be the solution which some economists would prescribe, but it is directly contrary to the Congressionally imposed requirement of Section 254(g) which was adopted to protect broader public interest values. The suggestion that such a rate structure would pass muster because it would not involve geographical discrimination ignores the fact that under this plan, rural CLEC customers would pay higher rates than urban customers, whether subscribers of an ILEC or a CLEC.

The same conclusion is applicable to the variations on "calling party pays," which would erect an unacceptably discriminatory and anti-competitive barriers. "Calling party pays" solutions are also contrary to the public interest because they introduce substantial additional post-dial delay.

B. MANDATORY DETARIFFING WOULD IMPAIR SERVICE IN RURAL AREAS.

The proposal to require mandatory detariffing of CLEC access charges and require negotiated rates in every case, would give extraordinary power to the large IXCs at the expense of small, rural CLECs. The Commission's Initial Regulatory Flexibility Analysis says only that "The proposals in Sections VIII.D and VIII.E should not have a significant impact on samll entities."[36] This is clearly inadequate, not only for the detariffing proposal, but for all the proposals which, as discussed in the comments, will have major impacts on small CLECs to the extent of affecting their continued viability.

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35 NPRM at para. 245

36 NPRM at para. 277

Besides the legal impediments to such requirement which are currently before the Court of Appeals, tariffs provide an important tool which allows a small rural CLEC to establish uniform rates and conditions for all its access customers. In the absence of this standard, it must not only devote a large portion of its resources to continual negotiation with various carriers, but on each change, review all its other agreements to ensure that there is no unjust discrimination or violation of any "most-favored-nation" clauses. Individual negotiations may be preferable for large CLECs operating in urban markets, but such a requirement imposed on small CLECs in rural markets would push them one step closer to extinction, as AT&T would still have the ability to refuse to provide service unless its desired rate levels were accepted.

IV. RICA PROPOSED RULES AND POLICIES

The essential conclusions the Commission should reach in this proceeding are that an IXC cannot refuse to provide service to customers of rural CLECs, that IXCs must charge the same rates for long distance service to urban and rural consumers, regardless of whether they are subscribers of a CLEC, and that a streamlined method of determining the lawfulness of CLEC rates should be established, such as a benchmark. RICA provides below specific suggestions for implementation of these conclusions.

A. IXCS MUST BE REQUIRED TO PROVIDE SERVICE ON EQUAL TERMS AND CONDITIONS TO ALL SUBSCRIBERS, REGARDLESS OF THEIR CHOICE OF LEC.

The Commission should make clear that existing law requires IXCs to serve all customers who request their service on equal terms and conditions, regardless of the customer's choice of LEC or the level of access charges of the LEC. In other words, IXCs must comply with

Sections 201, 202 and 254(g). This does not mean that IXCs, and thus their customers, are compelled to pay unjust or unreasonable access charges, but only that their remedy is not to refuse service or to charge discriminatory rates or violate Section 254(g). The Commission should also make clear to IXCs that it is open to receipt of challenges to the level of CLEC access charges that exceed the benchmark described below.

B. CLEC RATES EQUAL OR BELOW A VALID BENCHMARK SHOULD BE PRESUMED REASONABLE.

RICA agrees that if satisfactory results can be expected, market solutions are preferable. But market solutions are premised on a more or less free market, in which neither buyers nor sellers have market power. There is considerable reason to expect market failure, however, in situations where the market power of AT&T or other large IXC is compared to that of small rural CLECs. Nevertheless, if the obligations of IXCs to serve all customers are clearly established, RICA would support a benchmark methodology to specify a presumptively reasonable rate. The method must, however, make provision for carriers with costs above the benchmark to establish their rates on an individual basis.

A starting point for such a benchmark could be the effective interstate rate of ILEC parent of the CLEC for the adjacent area. Where the ILEC files its own tariff, that rate would set the benchmark. Where the ILEC uses NECA rates, its actual access costs and revenues are usually either above or below the rate. RICA therefore proposes that initially, the NECA rate, increased or decreased by the net settlement, would establish the benchmark access rate for these companies. After a transition of three to five years, the NECA rate would be used.

For RICA member companies, a benchmark set at rates based on their parent ILEC's costs is a reasonable method, because their CLECs operate under very similar environmental conditions and therefore have similar costs. The rates of the ILEC in the area in which the CLEC operates generally do not provide a valid benchmark in rural areas because, as described above, the access rate is usually a state wide average rate where the costs of a small number of rural lines are averaged with a much larger number of lower cost urban lines and are based on generally older, depreciated plant.

V. CONCLUSION

The Commission should use this proceeding to make clear that IXCs are required to serve all customers who request their service, regardless of which local exchange carrier serves the customer. Further, IXC rates to such customers must be the same for urban and rural customers; and this requirement cannot be avoided by imposing surcharges on rural customers. The Commission should also establish benchmark access rates for rural CLECs which would be presumed lawful, with a process to justify rates above that level. After a three to five year transition, the benchmark should equal the NECA rates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of Rural Independent Competitive Alliance" was served on this 29th day of October 1999, by hand delivery, to the following parties:

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